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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNIVERSAL CITY STUDIOS, INC.,

Plaintiff,

-against-

NINTENDO CO. LTD. and
NINTENDO OF AMERICA, INC.,

Defendants.

82 Civ. 4259
(RWS)

AFFIDAVIT OF
MARY D. FAUCHER

STATE OF NEW YORK)

COUNTY OF NEW YORK)

ss.:

MARY D. FAUCHER, being duly sworn, deposes and says:

1. I am associated with Townley & Updike, attorneys for plaintiff Universal City Studios, Inc. ("Universal") in the above matter. I am fully familiar with the facts and circumstances of this case. I submit this affidavit in opposition to defendants' motion for summary judgment on Universal's Lanham Act, unfair competition and dilution claims.

2. In support of their motion, defendants argue, inter alia, that their Donkey Kong game and licensing program for the name Donkey Kong are not likely to cause confusion as to the source or sponsorship of that name and game, nor are the name, game or licensing program likely to cause dilution. The exhibits to this affidavit demonstrate that these assertions are incorrect.

The Public Believes Donkey Kong
Is A KING KONG Spin-Off

3. Annexed to this affidavit are excerpts from a variety of articles written by commentators who analyze and explain how to play video arcade games. In discussing and describing the game Donkey Kong, these commentators made the connection between defendants' name and game and Universal's KING KONG, and therefore implicitly made the connection between defendants' name and game and Universal. Defendants acknowledge this fact in their letters to these commentators, wherein they felt compelled to disavow a connection with or authorization from Universal. See Exhibits 5, 8, 10, 12, 14, 16, 18, 20 and 21 to the Deposition Transcript of Susan Schoenecker, collected in Plaintiff's Volume of Deposition Transcript Excerpts submitted in opposition to defendants' motion. These excerpts from the articles written by video game commentators may be summarized as follows.

4. Exhibit 1 is an article entitled "Conquering: Donkey Kong" which appeared in the October 1982 issue of Videogaming Illustrated at page 40. Videogaming Illustrated is published and edited by one of defendants' affiants on this motion, Jeff Rovin. This article includes a picture of KING KONG placed next to a picture of defendants' Donkey Kong and states that KING KONG "has much in common with the video villain [Donkey Kong]," and that "[w]hile King Kong and Donkey Kong slug it out for cultural immortality, the public need only concern itself with having fun" In describing how to

play the game, the character Donkey Kong is referred to simply as Kong.

5. Exhibit 2 is another article from the October 1982 Videogaming Illustrated magazine which appeared at page 51 of that issue and which is entitled: "Meet the original . . . Donkey Kong." That article states: "Inarguably, the most visible of Donkey Kong's predecessors is King Kong and his movie kin." The character KING KONG is referred to in this article simply as Kong, as was the case in both the 1933 and 1976 "King Kong" movies.

6. Exhibit 3 is an excerpt from a book entitled The Winners' Book of Video Games, authored by Craig Kubey. The book purports to explain "how to outfox the most diabolic coin-op and home games - with strategy and style!" In the "Acknowledgements" section of the book, Mr. Kubey thanks Ronald Judy of defendant Nintendo of America, Inc. for his assistance. Mr. Judy testified at his deposition in this matter that prior to June 29, 1982, he never heard or saw KING KONG and Donkey Kong compared. Deposition Transcript of Ronald Judy (hereinafter "Judy Dep.") at 43-44. At page 136 of this book, Mr. Kubey describes Donkey Kong as "a video version of the film classic King Kong." Mr. Kubey asserts that "Nintendo calls the gorilla [character in the game] Kong" and he also refers to Donkey Kong simply as Kong.

7. Exhibit 4 is an excerpt from a book entitled Video

Invaders by Steve Bloom. At page 181 of that book, Mr. Bloom states that "[w]hoever dreamt up Donkey Kong obviously had the 1933 version of King Kong in mind," and he refers to the character Donkey Kong as "[t]his latter-day Kong" or simply as Kong.

8. Exhibit 5 is an article from the May 1982 issue of the magazine Electronic Games, entitled "King Kong Goes Coin-Op," by Bill Kunkel. Mr. Kunkel describes the Donkey Kong game in this article, which is accompanied by an illustration of KING KONG holding a barrel.

9. Exhibit 6 is an article from the July 1982 issue of the magazine Heavy Metal entitled "Nintendo's Donkey Kong Morality Tale or Theatre of the Absurd?," authored by John Holmstrom. Mr. Holmstrom states that "Donkey Kong takes elements from two classics - Don Quixote and King Kong," and he repeatedly refers to the Donkey Kong character simply as Kong.

10. Exhibit 7 is an article from the August 1982 issue of Video Games entitled "Donkey Kong." In describing the Donkey Kong game, this article asserts: "It's King Kong-time, boys and girls."

11. Exhibit 8 is an article from the October 1982 issue of Electronic Games entitled "Coin-Op Classroom, Making a Monkey Out of Donkey Kong," authored by Bill Heineman. In describing the Donkey Kong game, Mr. Heineman suggests that the

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character Donkey Kong "began living out the part of King Kong" in the game. Mr. Heineman refers to the character Donkey Kong simply as Kong.

12. Exhibit 9 is an article from the November 1982 issue of Joystick entitled "Donkey Kong." This article describes how to play the game Donkey Kong, and refers to the Donkey Kong character as KING KONG, or simply Kong. The article is accompanied by a variety of stills from the 1933 "King Kong" movie.

13. Exhibit 10 is an excerpt from an article appearing in the February 1983 issue of Film Comment entitled "Video Games: Sons of Pong." In this article the sequence of the Donkey Kong game is described as follows: "The game begins with King Kong grabbing Fay Wray" The Donkey Kong character is also referred to simply as Kong.

14. Exhibit 11 is an excerpt from a book entitled How to Win At Donkey Kong. This book refers to the character Donkey Kong as KING KONG, or simply as Kong.

15. Exhibit 12 consists of excerpts from video "how-to" books (A: How to Win At Video Games; B: Secrets of the Video Game Super Stars; C: How to Beat the Video Games; and D: How to Win At Home Video Games). In describing the Donkey Kong game, all of these articles refer to the Donkey Kong character simply as Kong.

16. Exhibit 13 is a press release produced for plaintiff by defendant Nintendo of America, Inc. in discovery. It was also marked as Exhibit 2 to Mr. Judy's deposition. This press release refers to the characters Donkey Kong and Donkey Kong Junior as "the Kong family."

17. Exhibit 14 is an article from the March 1982 issue of RePlay entitled "Riders of 'Donkey Kong.'" The article contains pictures of Messrs. Arakawa, Judy and Stone, all of whom are employees of defendant Nintendo of America, Inc., and all of whom were deposed in this action. Mr. Judy recalled being interviewed by reporters from RePlay magazine and recalled that Donkey Kong was discussed in that interview. Judy Dep. at 50-51. This article states: "For those who don't already know, 'Donkey Kong' is a cute game loosely based on the King Kong theme."

18. Defendants maintain that the building structure in their Donkey Kong game could never be mistaken for the Empire State Building (See Defendants' "Memorandum of Law In Support of Defendants' Motion for Summary Judgment" at 96). Nonetheless, as set forth in Exhibit 15, Jerry Knight, a reporter for The Washington Post, stated, in an article appearing in the May 1, 1982 edition of that newspaper at pages D8 - D9, that "Donkey Kong players dodge obstacles while scaling the Empire State Building."

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19. In April of this year, Robert Keith & Co. placed an eighty-four foot high inflatable replica balloon of KING KONG on the Empire State Building to commemorate the fiftieth anniversary of the premiere of the 1933 version of the movie "King Kong." This promotion was approved by Universal, and is described in Exhibit 16, an excerpt from the March 21, 1983 issue of Advertising Age.

20. On April 13, 1983, I watched the television broadcast of "Independent Network News," a news program broadcast on television station WPIX (Channel 11) in New York City. During that broadcast, Christy Ferer, a newscaster on the show, in describing the attempt to hoist the Robert Keith & Co. balloon onto the Empire State Building, stated: "The giant game of Donkey Kong at the top of the Empire State Building is finally over. It took a week longer than expected, but at long last the king of gorillas is finally up there." A transcript of that segment of the news broadcast is annexed as Exhibit 17.

21. The foregoing exhibits demonstrate that the public is likely to believe that Donkey Kong is a spin-off from KING KONG. The exhibits show that people recognize that the Donkey Kong name, character and game are based on KING KONG and his story. The connection people make between the Donkey Kong and KING KONG characters is so great that people call defendants' character KING KONG - plaintiff's name.

22. Furthermore, the foregoing exhibits demonstrate the likelihood of dilution of the KING KONG mark created by Donkey Kong. That the potential for the "blurring" of the two characters is high is shown by the repeated instances where Donkey Kong is referred to simply as Kong, even by defendant Nintendo of America, Inc.

Use of Trademarks as Nicknames
and Metaphors Does Not
Diminish Their Power as Marks

23. Defendants also argue that when trademarks are used as nicknames or metaphors, they can no longer function as indicators of source or sponsorship. The following exhibits evidence precisely such uses of the words Donkey Kong and Mickey Mouse. It is doubtful that defendants will maintain this argument in the face of such proof. Presumably, they will concede that such use does not diminish the alleged strength of the Mickey Mouse mark, and surely they will argue that such use does not diminish the alleged strength of the Donkey Kong mark.

24. Mickey Mouse has been licensed for use on well over 50,000 products. See Exhibit 18. Its significance as a trademark cannot be disputed. Nonetheless, Mickey Mouse is defined in Webster's New Collegiate Dictionary as "lacking importance: INSIGNIFICANT, PETTY," see Exhibit 19, and in The Random House Dictionary of the English Language as "trite and commercially slick in character." See Exhibit 20. Even the

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President of the United States has used the term "Mickey Mouse" metaphorically. See Exhibit 21.

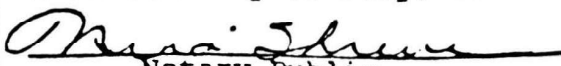
25. Moreover, Donkey Kong has been used as an adjective to describe Democrats who support high technology industries located in the United States, see Exhibits 22 and 23, and the term has been suggested as a nickname for the Democratic National Committee. See Exhibit 24. Surely defendants would not argue that this makes Donkey Kong the generic term for such Democrats or the Democratic Party.

Conclusion

26. At the very least, all of the foregoing exhibits raise material factual issues which can only be resolved after a trial. The central issue of likelihood of confusion cannot be addressed in a summary judgment context in light of the conflicting evidence presented. Consequently, defendants' motion must be denied.


Mary D. Faucher

Sworn to before me
this 6th day of July, 1983.


Notary Public

NINA SHREVE
Notary Public, State of New York
No. 4709088
Qualified in New York County
Term Expires March 30, 1985